

Cracow, June 3, 2013

Labour Mobility Initiative

Opinion on compromise amendments to the draft directive of the European Parliament and the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

General assessment

In the opinion of the Labour Mobility Initiative, the compromise amendments in the draft implementing directive within the scope of posting of workers will ensure a good balance between protection of employee rights and securing freedom of services within the European Union.

However, we would like to express our deep concern with the wording of section 3e in Article 3 (amendment AA) which, in fact, will lead to blocking of trans-border provision of service by replacing **temporary** nature of posting by **one-time** nature of posting. In our opinion, this provision, in its present wording, goes beyond the provisions of basic Directive 96/71/EC which stipulates **temporary** nature of posting.

The document also lacks a solution for the problem of posting employees by the so-called **post-box companies**. During the debate, Ms. Danuta Jazłowiecka, MP, drew attention to the fact that no politician nor social partner has proposed a definition which would allow for more efficient detection of abuse of this type. Bearing this mind, Labour Mobility Initiative undertook to prepare such solution. It was presented in a separate document attached to this opinion.

Remarks concerning the compromise

1) Compromise amendment AA to Article 3.3(e)

“(e) any repeated previous periods during which the post was filled by the same or another (posted) worker”

This section makes reference to the provisions of Directive 96/71/EC which, in Article 3, stipulates **temporary posting** of employees for the purpose of performing work in a territory of another Member State than the State where they are normally employed.

The term **temporary posting** is specified in detail in Basic regulation 883/2004 in Article 12:

“A person who pursues an activity as an employed person in a Member State on behalf of an employer

which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed **twenty-four months** and that he is **not sent to replace another person.**"

In executive regulation 987/2009 the term "replace another posted person" was not additionally specified due to the fact that so far it has not raised any interpretation problems. It is used to strengthen the **temporary nature of posting** and eliminate circumvention of provisions consisting in permanent filling of specific posts with posted employees, which would be contradictory with the idea of **temporary performance of work** within the scope of an agreement concluded between a posting company and the recipient of services in the host country.

The legislator's objective was prevention of the never-ending rotation of subsequent posted employees at **the same work places and for the same purposes** and, thereby, prevention of the transformation of the temporary nature of posting into permanent.

Meanwhile, the provision suggested in compromise amendment AA introduces a radical and, so far unapplied interpretation of the term of **temporary posting**, transforming it, in fact, into **one-time posting**. In this manner, majority of services, in particular seasonal services, cyclical services or services whose nature requires rotation work, are removed beyond the framework of posting.

Practical examples

a) seasonal services

Each year the vineyard owners in Austria, France, Germany, Italy, Portugal, Spain and other countries hire seasonal pickers for a period of intensive grape harvesting. Local labour force is insufficient, so they are looking for subcontractors, including employment agencies in other Member States.

Seasonal hiring of physical workers as "grape pickers" for a period of 3 – 6 weeks every subsequent year is a completely permissible – not to say – a typical example of temporary posting compliant with Directive 96/71/EC which does not have the characteristics of permanence.

In line with the provision in compromise amendment AA in Art. 3.3(e), **IT IS NOT POSTING** due to the fact that in earlier periods, this worker or other posted worker worked at the same position (grape picker).

The provision in compromise amendment AA in Article 3.3(e) excludes all services provided seasonally or cyclically from posting, even if the cyclical character means that they are provided rarely, but in repetitive short periods of time (e.g. for a month every year, for a week every three months, etc.).

b) services whose nature requires rotation work

There are services which **cannot be provided by the same worker** for an entire period of service duration. This results from the character and the nature of work. If the nature of work is burdensome for the worker, rotation work is necessary when workers rotate in specific periods of time – for example every two weeks. An example of such services is taking care of elderly persons at the place of their residence. On account of significant psychical burden which accompanies such work, carers of elderly persons rotate at the work position in the following system: patient 1 – holiday – patient 2 – holiday – patient 1.

Within the scope of providing care services for elderly persons, rotation of workers is applied to protect the right of workers to rest and to prevent overtime.

Provision of care services for elderly persons (on the condition that it does not exceed 24 months) is an

example of temporary posting compliant with Directive 96/71/EC, which does not have the characteristics of permanence.

In line with the provision in compromise amendment AA in Article 3.3(e) **THIS IS NOT POSTING** due to the fact that in earlier periods, this worker or another posted worker worked at the same position (carer of an elderly person).

The provision in compromise amendment AA in Article 3.3(e) blocks all services where, on account of protection of employees, rotational system of work is applied, i.e. work where employees, within the scope of provision of services, have to change in short periods of times.

In our opinion, the provision proposed in compromise amendment AA in Art. 3.3(e) does not strengthen the **TEMPORARY nature of posting**, but introduces a **ONE-TIME nature of posting**, and, in this respect, goes beyond the provisions of basic Directive 96/71/EC. It is worth remembering that the intention declared by the European Parliament and the Commission is avoidance of provisions which are inconsistent with basic Directive 96/71/EC.

Proposal of change

The provision in compromise amendment AA in Art. 3.3(e) leads, in our opinion, to erroneous over-interpretation of the term "replacement", thereby departing from provisions of Directive 96/71. Our proposals:

- **removal of section (e)** in Article 3.3, due to the fact that Directive 96/71 is sufficient in this respect and has never caused interpretation problems.

If removal of this provision turns out to be impossible, the following changes should be taken into consideration:

- **replacement by a provision** making references to the proposal of the IMCO Commission which has the following wording:
"whether the posted employee replaces another posted employee or not"
- **modification of the current provision** as follows:
*"whether a situation was repeated when **a given position** was filled by the same or another posted worker, who worked **without brakes** and **whose period of posting ended**"*

2) compromise amendment AA to Article 3.3(f):

"(f) possession of a valid A1 form, issued for the posted worker"

The A1 form is issued upon the employer's or employee's request. This fact suggests that the A1 form is a clearly declarative administrative decision which means that it does not create (constitute) the law, but only declares its existence.

The A1 form, certified by a competent institution, confirms that the worker holding it was posted within the meaning of Directive 96/71/EC. The document is **binding for control institutions** of the host country until it has been annulled by the institution that issued it.

Even if the competent institution of a host Member State decides that elements characterizing the posting were not complied with, then in a situation where a worker has a valid A1 form, he **has to be treated as a**

posted worker until the A1 form is annulled as a result of administrative proceedings.

The A1 form, as a document confirming posting, cannot be used simultaneously as an element for determination whether we are dealing with posting or not. In other words, it cannot be used as the “factual element characterizing the work.”

Practical example

Posting companies have been educating workers for many years about safe and legal work abroad. They encourage the workers to make sure every time that the employer who sends them abroad provides them with the A1 form. Only a valid A1 form guarantees that an employer posted a worker in compliance with the law.

Therefore, the A1 form is associated by posted workers with safety and legal work abroad and means that the employer posts them in line with the provisions. Absence of the A1 form is a signal that the posting employer may be unreliable. Such connotation is beneficial from the point of view of countering abuse and circumvention of legal provisions.

The current provision contained in Article 3.3(f) threatens the workers' trust to the social security institution of a posting state, which confirms the A1 forms.

The current provision contained in Article 3.3(f) **weakens the rank of the A1 form** and results in the fact that it will no longer confirm legal posting for workers; it will only constitute fulfillment of one of many elements confirming the fact that posting takes place.

Provision in Article 3.3(f) weakens the role of the A1 from a document confirming the fact that we are dealing with posting to the role of one of many elements testifying to the fact that we may be dealing with posting. This will lead to – contrary to the legislator's intentions – an increase in the number of abuses and cases of circumventing legal provisions by unfair posting companies along with development of the grey zone.

Proposal of change

As Labour Mobility Initiative, we propose commencement of Article 3 from words:

*“3. If the A1 form was not certified for a posted worker for the purpose of assessing whether a temporarily posted worker performs work in another Member State than the state of his normal work, **all factual circumstances characterizing such work and the worker's situation are examined.**”*

If the above modification of the provision turns out to be impossible it is necessary, in our opinion, to consider adding the following section:

“4. Possession of a valid A1 form, issued for a posted worker constitutes confirmation of compliance with elements listed in Sections 2 and 3 until the moment of its annulment or cancellation.”

3) “may” or “shall” dilemma

In our opinion, the discussion about the choice of terms “may” or “shall” in Article 3.2 and 3.3. no longer

determines application of an open or a closed list of control elements. Both may be supplemented by the Member States and the obligation of notifying the Commission about supplementing elements complies with the law transparency condition.

However, there is a strong argument in favour of using the word “may” in Section 3.2 and 3.3. The term “shall” requires the local control authorities to present an in-depth analysis of over one million posted employees and over 100,000 posting companies. Do we have the necessary resources and the army of control clerks to entrust fulfilment of this obligation to the Member States?

The word “may” offers a possibility of control, whereas the word “shall” imposes the obligation on all Member States which, in our opinion, is impossible to fulfil. Use of the word “shall” will paralyze all control institutions already in the first cases, leaving the rest of the EU labour market (not only of posted workers) without proper control.

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This opinion was consulted with organizations:

- ***Polish HR Forum***
- ***Union of Employers All-Polish Convention of Labour Agencies***
- ***Chamber of Polish Employers***